STATE OF MICHIGAN

COURT OF APPEALS

UNPUBLISHED
June 21, 2011

In the Matter of MOODY, Minor.

No. 300986
Kent Circuit Court
Family Division
LC No. 09-053465-NA

Before: SHAPIRO, P.J., and O'CONNELL and OWENS, JJ.

PER CURIAM.

Respondent-appellant appeals as of right the trial court order terminating his parental rights to the minor child under MCL 712A.19b(3)(c)(*i*), (g) and (j). On appeal, respondent does not contest whether sufficient evidence supported the statutory grounds to terminate his parental rights, but argues the trial court deprived him of the right to be represented by counsel at every hearing, denied him the right to fully and meaningfully participate in his child protective proceeding by failing to secure his telephonic presence at every hearing, and erred in finding that petitioner made reasonable reunification efforts. We affirm.

Respondent was incarcerated in federal prison for conspiracy to sell cocaine before his minor child turned two years old and remained imprisoned continuously throughout the child's lifetime. His earliest release date was December 18, 2011. The child's mother had a 12-year history of protective services involvement. Domestic violence with a live-together partner prompted the child's removal from her care at age eight, and commencement of this proceeding. Respondent's whereabouts were unknown until after the adjudication trial, but the trial court assumed jurisdiction over the child pursuant to her mother's admissions to allegations in the petition. Eventually, the child's mother voluntarily relinquished her parental rights and is not participating in this appeal.

Respondent first contends the trial court reversibly erred by discharging his court-appointed counsel mid-proceeding, leaving him unrepresented for several months and at the permanency planning hearing, thereby negatively impacting his ability to provide evidence and prejudicing the outcome of his case. The right to due process indirectly guaranteed respondent assistance of counsel in this child protective proceeding, *Reist v Bay Circuit Judge*, 396 Mich 326, 349; 241 NW2d 55 (1976), and an indigent respondent has the right to appointed counsel in termination of parental rights proceedings. MCL 712A.17c(5); MCR 3.915(B)(1)(b). Respondent, however, did not preserve for review his claim of deprivation of counsel and to obtain relief, he must show: (1) an error occurred; (2) the error was obvious; and (3) it affected

his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error affects substantial rights if it causes prejudice, meaning that it affects the outcome of the proceedings. *In re Utrera*, 281 Mich App 1, 9; 761 NW2d 253 (2008).

As noted above, respondent's whereabouts were unknown until after the adjudication trial, but court-appointed counsel represented him at four of the five hearings in this proceeding: the October 2, 2009 preliminary hearing, December 2, 2009 adjudication trial, June 23, 2010 review hearing, and October 6, 2010 termination hearing. Counsel did not represent respondent at the March 10, 2010 permanency planning hearing because, in its December 2, 2009 adjudication order, the trial court continued counsel's appointment for only an additional 30 days to ascertain respondent's whereabouts and apprise him of what had transpired thus far in the proceeding. Respondent was located in federal prison in Virginia on or about December 9, 2009, and counsel did not represent him at the March 10, 2010 permanency planning hearing. The trial court did not reappoint counsel until May 21, 2010, leaving respondent unrepresented from January 2, 2010 to May 21, 2010.

Although respondent had a right to counsel, the record showed that lack of representation for part of the proceeding did not cause prejudice or negatively affect the outcome of the proceeding in this case, and therefore there was no plain error requiring reversal. Little evidence regarding respondent was presented at the March 10, 2010 hearing, other than that he desired to parent the child after his release from prison, had family support, was literate, and denied mental health or substance abuse issues. Respondent did not prejudice his case in the two letters he mailed the caseworker during the period of time he was unrepresented, and respondent had ample opportunity between May 2010 and October 2010 to provide counsel with evidence helpful to his case. Also, respondent had the opportunity to present any and all evidence at the termination hearing that he would have presented at the March 10, 2010 hearing. A hearing without counsel can constitute harmless error where testimony is later taken at the termination hearing when counsel is present. *In re Hall*, 188 Mich App 217, 222-223; 469 NW2d 56 (1991). Unfortunately, respondent's testimony at the termination hearing was devoid of evidence convincing the trial court that he had a relationship with the minor child, had engaged in reunification services while in prison, or had a plan to support the child once he was released.

Respondent next cites MCR 2.004 for the proposition that the trial court could not take action on the petition without affording him the opportunity to appear by telephone and, in so doing, deprived him of a reasonable opportunity to participate in the child protective proceeding. The court rule states that a trial court must order telephone participation in termination proceedings when the parent is incarcerated within the custody of the Department of Corrections. MCR 2.004. However, respondent was not incarcerated under the jurisdiction of the Michigan Department of Corrections, but in the federal prison system. MCR 2.004(A)(2) did not apply in his case. *In re BAD*, 264 Mich App 66, 71; 690 NW2d 287 (2004).

Although MCR 2.004 was inapplicable, due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decision maker. *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000). Respondent did not preserve for review whether failing to secure his telephonic presence at all hearings violated his right to due process. To obtain relief, he

again must show: (1) an error occurred; (2) the error was obvious; and (3) it affected his substantial rights. *Carines*, 460 Mich at 763.

Respondent was telephonically present at only the October 6, 2010 termination hearing. His whereabouts were unknown at the time of the October 2, 2009 preliminary hearing and the December 2, 2009 adjudication trial and, although located by the time of the March 10, 2010 permanency planning hearing, his presence was not secured. The trial court attempted to arrange respondent's telephonic appearance at the scheduled June 23, 2010 termination hearing, but was unsuccessful because respondent had been moved to an unknown location in the federal prison system. Thus, it postponed the termination hearing to allow for his presence. Respondent claims that had he been telephonically present at the December 2, 2009 adjudication trial, the trial court might have continued his court-appointed representation at subsequent hearings. However, respondent's whereabouts were unknown at the time of the adjudication trial so securing his presence by speakerphone was impossible and, as noted above, any lack of representation by counsel between January 2, 2010 and May 21, 2010 did not prejudice respondent's case. In addition, although present at the termination hearing, respondent failed to present evidence convincing the trial court to allow him additional time for reunification. The March 10, 2010 hearing was the only hearing at which the trial court failed to secure respondent's presence without a reason. Failing to secure respondent's presence by telephone was not error because MCR 2.004 did not apply to respondent and, under a due process analysis, would have been harmless error because it did not cause prejudice or negatively affect the outcome of the proceeding. There was no plain error requiring reversal.

Lastly, respondent asserts petitioner and the caseworker failed to make adequate reunification efforts, the trial court condoned their lack of effort, and the lack of effort resulted in insufficient evidence to terminate his parental rights. Whether petitioner made reasonable efforts to prevent removal and to facilitate reunification is a question of fact. We review the trial court's findings of fact under the clearly erroneous standard. MCR 3.977(K); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Generally, if reunification is the agency goal, the agency is required to provide an initial case service plan within 30 days of removal identifying specific goals to be achieved by the parties and projected time frames for meeting those goals, and the agency must update that case service plan every 90 days. MCL 712A.18f(5); MCR 3.965(E)(1), (E)(3). At the termination hearing, the reasonableness of services provided is relevant to whether the evidence is sufficient to terminate parental rights. *In re Newman*, 189 Mich App 61, 71; 472 NW2d 38 (1991).

Respondent contends that reasonable reunification efforts were not made because he was not provided a case service plan until 60 days after the caseworker discovered his whereabouts. The evidence showed respondent's location was ascertained on or about December 9, 2009 and the caseworker mailed respondent a copy of the case service plan and parent agency agreement in February 2010, which was past the statutory time requirement. However, the evidence also showed respondent initially failed to provide adequate information to enable the caseworker to formulate a comprehensive parent agency agreement and that the caseworker corresponded with respondent every month between January 2010 and September 2010, with the exception of June 2010, when her letter was returned as undelivered after respondent changed prisons. Each month, the caseworker requested respondent's return of a signed parent agency agreement and

signed release allowing her to communicate with prison officials, but, in ten months, respondent failed to return either document in the postage-paid envelopes the caseworker provided. At the termination hearing, respondent failed to testify to any services he had completed in prison, offer a reasonable explanation why he failed to return a signed release, and was unable to even identify the caseworker's name. Lack of reunification efforts was attributable to respondent, not petitioner or the caseworker. As the trial court correctly noted in its oral opinion, the caseworker did an "excellent job in communicating with an incarcerated parent" and respondent received "multiple invitations to cooperate," but failed to do so. The trial court did not err in finding petitioner made reasonable efforts toward reunification.

Respondent analogizes his case to *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), in terms of being denied a meaningful opportunity to participate in his child protective proceeding because, due to his incarceration, his presence was not secured at every hearing and little reunification effort occurred. Like the respondent in *Mason*, respondent herein was incarcerated and not present at adjudication and review hearings. The similarity between the cases ends there. The decision in *Mason* turned significantly on the fact that MCR 2.004 was applicable but respondent Mason was completely excluded from his proceeding for 16 months despite knowledge of his whereabouts, and on the fact that petitioner in that case may have never provided respondent Mason with a case service plan and completely abandoned its duty to facilitate his reunification with the children. *Mason*, 486 Mich at 147-150. In contrast, respondent in the present case was in federal prison so MCR 2.004 did not apply, petitioner corresponded with respondent regularly and repeatedly attempted to engage him in the case and obtain information from him, and little reunification effort occurred because respondent chose not to cooperate with petitioner. The *Mason* case is not analogous to the present case.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Peter D. O'Connell
/s/ Donald S. Owens